

Mr. Randy Bates, Director  
Department of Natural Resources  
Division of Ocean and Coastal Management  
302 Gold St., Suite 202  
Juneau, Alaska 99811-1030

August 14, 2008

Dear Mr. Bates,

Thank you for providing The Nature Conservancy (the Conservancy) the opportunity to make recommendations for changes to the Alaska Coastal Management Program (ACMP). The mission of The Nature Conservancy is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. The Alaska Chapter of the Conservancy was established in 1988 and is guided by a Board of Trustees that represents a cross-section of Alaska's conservation, business and civic leaders.

The Conservancy is very supportive of the underlying purposes of the ACMP. We think the ACMP can, with some changes, fulfill its fundamental goal of providing Alaskans the opportunity and mechanism to achieve balance between the development and protection of Alaska's vital coastal areas and resources.

The Conservancy has three general areas where we think improvements to the ACMP are needed if Alaska is to develop its coastal resources and communities while maintaining the biologically and economically significant ecological functions of a healthy coastal environment.

1. We support changes to strengthen the statewide habitat standards.
2. We support giving coastal districts greater authority to implement enforceable policies for significant habitats in their districts that are not adequately addressed by the statewide habitat standards.
3. We support a more inclusive decision making process that enables DEC and coastal districts to work closely with DNR, ADF&G and applicants to achieve the goals of the ACMP.

Our specific recommendations in each of these areas and our reasons for suggesting them are detailed below.

### **Habitat Standard – Content and Structure**

The Conservancy recommends amending the statewide habitat standard to return to the tiered approach originally adopted and used for over 26 years, during which time Alaska saw significant development of its coast with, we believe, reasonable accommodation for important coastal habitats.

The first tier of the habitats standard should state that each of the listed habitats is to be managed: “so as to maintain or enhance the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources.”

The requirement to “maintain or enhance the biological, physical, and chemical characteristics of the habitat” was removed from the ACMP in 2004. In the May 3, 2004 response to comments on the draft regulations, DNR said it made this change because “few (if any), projects could meet the literal test articulated in 80.130 . . .”<sup>1</sup>. The Conservancy does not believe it was unduly difficult for many projects to meet this requirement. For example, the ADF&G completed a cumulative effects study for the Kenai River that quantified king salmon habitat units along the river<sup>2</sup>. As a result of this study, projects were evaluated during ACMP consistency reviews to ensure they maintained or enhanced habitat units. In practice, many projects were able to be redesigned to actually increase king salmon habitat rather than just maintain it.

The second tier of the habitats standard should list each of the habitats and have specific additional management measures that address the unique characteristics of those areas. For example, the standard for estuaries should require projects to assure: “adequate water flow, natural circulation patterns, nutrients, and oxygen levels and avoid the discharge of toxic wastes, silt and destruction of productive habitat.” We have listed the specific habitats and proposed management measures we recommend be adopted in the chart below.

Finally, recognizing the reality that not all projects can meet the general standard of “maintain or enhance” habitats, the third tier of the approach should establish a process and criteria for approving projects that are unable to conform either with the general requirement to “maintain or enhance” habitats, or the specific management measures under each of the specific habitats.

The exception criteria would allow projects that can not meet the standards to be approved if they meet a three-part test: 1) There is a significant public need for the project, 2) there is no feasible or prudent alternative to conform to subsections of the standards, and 3) all feasible and prudent steps had been made to conform to the standards.

It is very important that the definition of “feasible and prudent” include a balancing test that considers public need and environmental, social and economic matters.

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<sup>1</sup> DNR 2004. Response to Public Comments February 20, 2004, Public Notice of Proposed ACMP Regulations. Office of Project Management and Permitting. May 3, 2004. 51 pp.

<sup>2</sup> Seaman, Glenn. 1995. *The continued assessment and management of cumulative impacts on Kenai River fish habitat*. Technical Report No. 95-6. Alaska Department of Fish and Game, Habitat and Restoration Division.

Feasible and prudent should be defined to mean: “consistent with sound engineering practice and not causing environmental, social, or economic problems that outweigh the public benefit to be derived from compliance with the standard which is modified by the term ‘feasible and prudent.’” This approach seems a reasonable way to ensure that the public benefits of protecting coastal habitats justify the costs to the applicant and are consistent with sound engineering practices.

We have listed the specific habitats with our proposed standards and compared them to current standards in the chart below.

*Comparison of Management Measures in the Conservancy’s Proposal and the Current Management Standards*

<b>Habitat Type</b>	<b>The Conservancy’s Proposed Management Measures Formerly 6 AAC 80.130(c)<sup>3</sup></b>	<b>Current Management Measures 11 AAC 112.300(b)<sup>4</sup></b>
Offshore Areas	Fisheries conservation zone to maintain or enhance sport, commercial & subsistence fisheries.	Avoid, minimize or mitigate significant adverse impacts to competing uses such as commercial, recreational or subsistence fishing.
Estuaries	Assure adequate water flow, natural circulation patterns, nutrients, and oxygen levels. Avoid discharges of toxic wastes, silt & destruction of productive habitat.	Avoid, minimize or mitigate significant adverse impacts to adequate water flow, natural water circulation and competing uses as commercial, recreational or subsistence fishing.
Wetlands & Tideflats	Assure adequate water flow, natural circulation patterns, nutrients, and oxygen levels. Avoid adverse effects to natural drainage patterns, destruction of important habitat, and discharge or toxic substances.	<u>Wetlands:</u> Avoid, minimize or mitigate significant adverse impacts to water flow and natural drainage patterns.
		<u>Tideflats:</u> Avoid, minimize or mitigate significant adverse impacts to water flow, natural drainage patterns and competing uses such as commercial, recreational or subsistence fishing.
Rocky Islands & Seacliffs	Avoid harassment of wildlife, destruction of important habitat, and introduction of competing or destructive species and predators.	Avoid, minimize or mitigate significant adverse impacts to habitat used by coastal species. Avoid introduction of competing or destructive species and predators.
Barrier Islands & Lagoons	Maintain adequate flows of sediments, detritus, and water. Avoid alteration of wave energy which would fill in lagoons or erode barrier islands. Discourage activities that decrease use of barrier islands by coastal species, including polar bears and nesting birds.	Avoid, minimize or mitigate significant adverse impacts to flows of sediments and water; from the alteration or redirection of wave energy or marine currents that would fill in lagoons or erode barrier island; and from activities that would decrease use of barrier islands by coastal species including polar bears and nesting birds.

<sup>3</sup> These standards are in addition to the proposed requirement to maintain or enhance the biological, physical and chemical characteristics of habitats.

<sup>4</sup> The measures in the current standards are the sole measures that may be considered during a project review.

Habitat Type	The Conservancy's Proposed Management Measures Formerly 6 AAC 80.130(c) <sup>3</sup>	Current Management Measures 11 AAC 112.300(b) <sup>4</sup>
High-Energy Coasts	Assure adequate mix and transport of sediments and nutrients. Avoid redirection of transport processes and wave energy.	Avoid, minimize or mitigate significant adverse impacts to mix of transport and transport of sediments and redirection of transport processes and wave energy.
Rivers, Streams & Lakes	Protect natural vegetation, water quality, important fish and wildlife habitat, and natural water flow.	Avoid, minimize or mitigate significant adverse impacts natural water flow, active flood plains and natural vegetation within riparian management areas.
Upland Habitat	No measures listed for this habitat.	This habitat removed from list of habitats in new standard.
Important Habitat	Not included in former standard it can be dropped in favor of upland habitat.	<u>Designations by Districts:</u> Managed for the special productivity of the habitat. <u>State Designations:</u> Avoid, minimize or mitigate impacts.

Sources: 6 AAC 80.130 and 11 AAC 114.300

One of our most significant concerns with the current management measures for the specific habitats listed above is the lack of emphasis on biological resources and habitat functions. The current management measures only mention animals in three of the habitat types. For most of the habitats only a few functions are mentioned. These are the only functions that can be considered during a project review. For example, the current management measures for offshore areas eliminate the ability to consider impacts to habitat because only competing uses are listed.

### Habitat Standard - Applicability

In addition to the changes above, The Conservancy recommends that the habitats standard apply throughout the coastal zone. To achieve this, a number of definitions need to be changed. The Conservancy finds that each of the current definitions listed below are too limiting to address all important coastal habitats and should be amended as follows.

- **Wetlands:** The definition should be changed to include all wetlands within the coastal zone. The current definition of wetlands applies only to wetlands draining directly to areas with measurable saltwater.
- **Coastal Waters:** The definition of coastal waters should include all water bodies in the coastal area. The current definition of coastal waters includes only waters with a measurable amount of salt water.
- **Uplands:** Important uplands should be one of the habitat types covered by the standard. Important uplands should be defined as areas, the use of which would have a direct and significant impact on coastal water. The current habitats standard includes a provision for designation of important habitat which could include upland areas; however, few of the important habitat areas proposed by coastal districts have been approved.
- **Rivers, Lakes and Streams:** The term “rivers, lakes and streams” should apply to all freshwater bodies within the coastal zone. The current definition limits the term to: 1)

waters catalogued as anadromous, 2) waters not catalogued as anadromous but those parts of waters the deputy commissioner determines exhibit evidence of anadromous fish, and 3) waters where uses would have a significant adverse impact on anadromous or coastal waters (11 AAC 112.990).

## **Coastal District Responsibilities and Authorities**

In addition to the recommended changes to the habitats standard and definitions, other changes are also important if Alaska is to effectively manage impacts on important coastal habitats. The recommendations discussed in the remainder of this section include: expanding the ability of coastal districts to develop policies; diluting the concentration of coastal decision making; and, returning DEC to the consistency review process.

The Conservancy believes that the requirements that a coastal district must meet to designate habitat areas are overly stringent and should be dropped. Instead, the ACMP should rely on the use of special area management plans (SAMPs); areas meriting special attention (AMSAs); and the revised habitat standards as the mechanisms for dealing with special habitat or development areas within coastal districts.

We make this recommendation because a number of existing criteria inappropriately limit the ability of coastal districts to develop meaningful enforceable policies, including policies for important habitat areas. For example, a district is required to designate important habitat areas in order to establish habitat-related policies. The requirements in 11 AAC 114.250(h) set an unnecessarily high threshold for establishing important habitat areas. First, districts must demonstrate that uses in the designated area have a direct and significant impact on coastal waters. Although the 1979 federal approval of the coastal zone boundaries found that uses within the entire coastal zone have the potential to have a direct and significant impact on coastal waters, a number of proposed areas were denied for not meeting this criterion. Second, districts must provide written scientific evidence that demonstrates that the designated areas are “biologically and significantly productive.” Although this term is not defined in the ACMP regulations, “scientific evidence” is defined in 11 AAC 114.990(40). By design, the scientific evidence “test is very stringent and meant to be limiting”<sup>5</sup> (DNR 2004, p. 86).

Only the Craig and Thorne Bay coastal districts received approval for important habitat areas under the initial plan approval process. These areas included eelgrass beds and limited buffers around selected anadromous streams. As a result of mediation, several additional important habitat areas were approved including those in the Juneau Wetlands Plan and water bird and waterfowl important habitat areas for the North Slope Borough and Northwest Arctic Borough coastal management plans. Restoring the ability of coastal districts to establish enforceable

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<sup>5</sup> DNR 2004. Response to Public Comments February 20, 2004, Public Notice of Proposed ACMP Regulations. Office of Project Management and Permitting. May 3, 2004. 51 pp.

policies for habitats will ensure that local concerns about habitat protection are adequately covered.

In a related matter, The Conservancy appreciates the efforts by the Division of Ocean and Coastal Management to work with us to advance the level of information available to coastal managers through the Shore Zone mapping project. This information will help identify areas of more or less productivity and help achieve the balance envisioned in the ACMP legislation.

### **Agency Coordination**

The ability of the ACMP to help make balanced decisions about effects to habitat depends in part on the inclusiveness of the decision-making process. Concentration of the decision making power for ACMP issues into a single agency; elimination of the Department of Environmental Conservation (DEC) from project reviews; and, the total elimination of the Coastal Policy Council (CPC) have tipped the balance of the ACMP toward development of sensitive coastal areas; reduced support for coastal decisions; and, alienated many coastal districts.

The Conservancy believes DEC should be part of the ACMP review to achieve the laudable goal of credible, coordinated and efficient permitting process. The 2003 ACMP legislation removed activities subject to a DEC statute or regulation from the coordinated ACMP consistency review process. This concept is commonly referred to as the “DEC carveout.” The DEC carveout results in a piecemeal review of projects, especially for aspects of projects related to habitat, and should be fixed. Further, air and water quality are closely related to the health of habitats, but with the DEC carveout, neither district policies nor comments submitted during ACMP consistency reviews may address air or water quality.

Expanding the decision-making authority for project elevations to include a consensus from the three resource agencies (DNR, DEC and ADF&G) would be an additional way to make decision making more inclusive, balanced and credible. Moving the program managers to an agency without permitting authority, such as the Division of Community and Regional Affairs, and requiring agreement among the three resource agencies would further help restore balance and credibility to the program.

### **Coastal Policy Board**

The Conservancy recommends establishment of a Coastal Policy Board with coastal district and agency representation. This will go a long way to restoring confidence in the ACMP and gaining more support from local people for coastal development decisions. To be effective, such a board would need to be responsible for approving coastal district plans, approving regulations changes and grant programs for distributing funds to agencies and districts. The former CPC was criticized for being ineffective and inefficient, but these problems can be prevented by providing clear direction to the proposed board and by possibly reducing the number of seats.

The Conservancy realizes it is making recommendations for significant changes to the ACMP. We understand that there are many different interests DNR must listen to and try to accommodate in developing proposed changes to the ACMP. The Conservancy welcomes the opportunity to work with you and other Alaskans to develop a coastal program that achieves the goal of managing Alaska's coast in a way that balances use and development of coastal resources with maintenance of significant ecosystem functions.

I look forward to working with you to implement needed changes to the ACMP. Thank you for your efforts to address our concerns.

Sincerely,

Randy Hagenstein  
Director